SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 699

JOSEPH COHEN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Prefatory Remarks

In this mass prosecution (75 defendants), under the guise of a single mail fraud (200 separate conspiracies were proved), the long and complicated trial (7 months), with its tremendous record (over 16,000 pages and 4,000 exhibits), presents crucial questions of law—as to some of which, the court below points out, there is diversity in the circuits.

Counsel is aware that *certiorari* will not issue merely to rectify error in a particular case, unless fundamental questions of law or policy are presented. Both are before the Supreme Court on this record.

We believe that beyond the clash of opinion on important legal principles, there is involved in this case a deeper,

a more profound problem of policy—which strikes at the very roots of the entire democratic process—that is, whether, in the administration of the criminal law, mass prosecutions, as typified by this trial, are to be countenanced and tolerated.

It is the firm conviction of counsel that the appellant has been the unfortunate victim of a most shocking, un-American type of trial; that it was only because of the mass prosecution, following a "dragnet" indictment, that the accused, Joseph Cohen, was tarred and feathered with the infamy and the sins of the many disreputable malefactors who were made his co-defendants.

It is respectfully prayed that this court, in granting a review of this extraordinary trial, should not restrict appellant to specific legal propositions which require dispositive determination. Rather, it is urged, that there be scrutiny of the entire record, so that, in appraising the canvas as a whole, it may be seen whether a fair and impartial hearing was, or could have been, achieved in this prejudicial atmosphere. On the basis of this record we contend that deprivation of liberty for seven years constitutes a shameful and flagrant denial of justice.

We believe that the time has come for the Supreme Court to put a halt to the tortured construction that has been placed upon the doctrine of "immaterial variance", as expressed in *U. S.* v. *Berger,* 295 U. S. 78, and which in its practical application, as now sanctioned by some lower courts, is producing a veritable perversion of justice.[9]

We respectfully submit that the administration of justice is bound to fall into the depths of disrepute unless the Supreme Court, in clear, stern notes speaks out now, in condemnation of mass prosecutions. We cannot read *U. S.* v.

[9] See dissenting opinion of Jerome Frank, J. in *U. S.* v. *Liss,* 137 Fed. (2) 995, 1001 *et seq.* with its eloquent denunciation of mass conspiracy trials.

Berger as intended, or calculated to commend the practice that has since grown so prevalent, of herding a great number of defendants into court on the charge of a single conspiracy, and when the proof discloses a variety of small unrelated and non-connected conspiracies, with different defendants, different subject matter, different locales, and different proof, and *no proof as to the single conspiracy charged in the indictment,* of then approving consequent verdicts of guilt, on the theory of "immaterial variance".

The history of such prosecutions, within recent years, has finally culminated in the instant monstrous proceeding, which appears to be the largest and longest criminal conspiracy trial in the annals of the Southern District of New York—and so far as counsel is aware, a longer and more intricate trial than has ever been reported in the books. We confidently believe that this Court will recognize the pre-eminent importance of forthright judicial assault upon this travesty on justice.

By reversing this judgment this Court will demonstrate that in the criminal law there dare not be a caricature of a "day in court" or of a "fair and impartial trial." Injustice, such as was here fashioned, should be stamped out as undemocratic, as violative of fundamental liberties—for it is only a step from this kind of judicial procedure to tyranny and oppression.

II

Opinion of the Court below

The opinion of the Circuit Court of Appeals for the Second Circuit is, as yet, unreported. It is annexed to the certified transcript of the record filed herein.[10] A copy of the opinion is hereto annexed as Appendix A.

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[10] The Record in this case, consisting of 16,000 pages which, by order of the Court below, was reduced to 12,000 pages, together with 4,000 exhibits, has not been printed. The stenographic transcript, as used in the Court

No opinion was rendered by the United States District Court for the Southern District of New York.

III

Jurisdiction

The jurisdiction of this Court is based upon Judicial Code, Sec. 240 (a), as amended by the Act of February 13, 1925, U. S. C. Title 28, Section 347 (a) and Rule XI of the Rules of Practice and Procedure in Criminal Cases promulgated by this Court May 7, 1934.

Date of Entry of Judgment and Denial of Petition for a Rehearing

The judgment sought to be reviewed was entered on October 18, 1944. The Court of Appeals, by order dated October 10, 1944, denied a petition for a rehearing.

IV

Statement of the Case

The summary statement of the case is set forth in the petition, and is therefore not here repeated, but is referred to for adoption as part of this brief. A summary of the argument is set forth in the Index.

V

Specification of Assigned Errors to be Urged

It is intended to urge all the errors assigned (R. 12776-13213), including the following rulings of the Circuit Court of Appeals:

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below, has been certified to this Court. A motion accompanying this application for *certiorari* prays for leave to present this cause upon the Record as certified by the Circuit Court of Appeals in stenographic form. A printed copy of the opinion of the Circuit Court of Appeals is annexed to and made part of the Record.

1. that there was no prejudice to appellant in being forced to trial in this mass prosecution; and that he received, in the seven months' trial, a fair and impartial hearing as guaranteed by the Constitution;

2. that Sec. 557 of Title 18, U. S. Code, permits the joinder of crimes when the accused are different;

3. that the Statute of Limitations is not a bar to a conspiracy in which the last overt act found was more than the statutory period prior to the indictment;

4. that appellate scrutiny need be no more exacting in a criminal than in a civil case, and that evidence sufficient to support a civil verdict will support a criminal one;

5. that the rejection of all the requests to charge was proper, and the trial charge, despite its brevity, was sufficient and complete, and that the trial court had not "forgotten something substantial;"

6. that there was no error in denying a severance or mistrial at any time during the trial, despite the elements of prejudice and danger, recognized, but minimized, in the opinion below;

7. that *Berger* v. *U. S.*, 295 U. S. 78, is authority for sustaining the propriety of this trial as one in which there was immaterial variance; and that there was no practical prejudice to the accused;

8. that a defendant accused of conspiracy must bear the risk of an unfair trial; and despite that danger, is not entitled to severance or immunity;

9. that there was no prejudicial error in reading *verbatim* to the jury, and admitting in evidence, an opinion of the Circuit Court of Appeals in the wholly unrelated mail fraud case of *Rosenberg* v. *U. S.*, 120 F. (2) 935;

10. that the prosecutor's mode of interrogation, in the cross examination of appellant, imputing by affirmations in his questions, criminal conviction to the employees of appellant, was "improper," but did not constitute reversible error;

11. that as to other objections urged, even if errors (and not discussed), the Court would not because of them "reverse convictions so just upon the merits," thereby betraying the refusal of the Second Circuit to apply "the harmless error doctrine" in conformity with the rule as laid down in the Supreme Court and the Fifth, Seventh, Eighth, Ninth and Tenth Circuits.

In addition to the foregoing specifications, here listed *seriatim*, counsel respectfully incorporate herein by reference, and adopt as part of this brief, the items listed in the annexed petition under the captions: "Questions Presented" and "Reasons for Allowance of Writ," together with the matter and references appearing in the footnotes thereunder.

VI

ARGUMENT

In this brief, no attempt is made to go into a detailed analysis of the unwieldly factual situations, since it is believed that little assistance will thereby be furnished to the Court for the purpose of determining whether *certiorari* should issue. Discussion will be limited solely to the legal problems which cut right through the mass of factual data, and which the opinion of the court below suggests to be of major consideration, inviting solution by the Court of last resort.

A summarization of the several points of law, hereinafter discussed, will be found listed in the Index under the caption: "Argument".

Point I

The Appellant Cohen by This Mass Prosecution, Was Denied His Constitutional Right to a Fair and Impartial Trial

No reported case, so far as counsel have been able to ascertain, is comparable to this extraordinary trial, for length of time consumed. It is *sui generis*, in that it lasted more than seven months—from August 4, 1941 to March 8, 1942—based upon an indictment of seventy-five defendants.

In complexity of issues, in variance of proof from indictment, and in the involvement of so many defendants on a so-called single scheme (which was neither proved nor provable), but which developed into two hundred conspiracies and over five hundred fraudulent transactions, this trial, with its multitudinous ramifications, proved to be incredibly unjust to the accused. It seems to be the embodiment of what is characteristically un-American in legal procedure.

Defendants, having such a long trial in prospect, with a protracted ordeal ahead, and the nightmare of burdensome expense—deprived, in the meantime of an opportunity to earn a living, must be overwhelmed by a sense of hopelessness and futility in achieving the semblance of a proper defense.[11]

[11] The confusion and multiplicity of issues in this trial led to the result that few lawyers in the case attended throughout the trial. Lawyers came and went. Some defendants who started with the aid of counsel, were soon serving *pro se*. Many lawyers absented themselves from time to time during the trial for the reason, as stated by the prosecutor:

> "I think the record should show that almost every day of the trial a few counsel are absent from the courtroom when the testimony does not relate specifically to their defendants." (R. 4220)

This is a strange commentary upon this trial when the need of alert and experienced counsel seemed so imperative. How could attorneys be, even on occasion, dispensed with, in face of the fact that the court throughout the trial was constantly and persistently admitting evidence as binding upon each and every defendant?

A mass prosecution of this type—calculated to dispose of a tremendous aggregation of men in one fell swoop, by some process of mob hysteria, is only identifiable with what we have heard about in Fascist Italy and under the forces of tyranny across the seas.

Does not this militate against our whole traditional concept of personal guilt—in the hope that by proper administration of the criminal law, an innocent man shall never be convicted through a callous indifference as to the fairness and integrity of the trial to which he is subjected.

Little wonder, then, that there were numerous pleas of guilty before, and at the eve of, and during the course of the trial. These pleas constituted a flight, by the hope of suspended or relatively slight sentences, from the practical reality of the tangled web, in which the defendants were enmeshed; from which otherwise escape was well nigh impossible. Attempted defense was fraught with burden, danger and expense beyond the endurance and means of most men.[12]

And, is it an idle question to ask, why this fate must be visited upon any single accused—to be made the victim of the sins of a lifetime of seventy-five men, all indicted conjointly with him? Why was it essential to have one trial with more than half a thousand fraudulent transactions (as to most of which an accused has no connection

[12] The following statement by the trial court, recognizing the hardship of mass prosecution, and that in ability to defend stimulated pleas of guilty, is very illuminating (R. 8716-7):

> "The Court: I will grant you this, that I think there is a reaction to some degree to these mail fraud statutes (cases) becoming too encompassing—and getting where they may be beyond human endurance, in the way of trial, or beyond human ken in the way of appreciation. • • • I will grant you that. There are varying views among the judiciary for separate indictments and strongly so. • • • The main division of thought is, whether to keep the people in court and let them answer, whether you are going to bargain on the conscience of a person."

or knowledge), paraded before a jury, to the end that every shred of this evidence shall be binding not only upon those shown to be involved, but upon everybody on trial, including appellant—with the inevitable likelihood that the guilt of others will engulf him as well.[13]

The welter of prejudice in the instant case, and the dangers of joint trial, by far exceeded that which was determined to constitute reversible error in *U. S.* v. *Haupt* (7th Cir.), 136 F. (2) 661, — where there was no such complexity of issues or length of trial, as we have here.

In the *Haupt* case, six defendants were brought jointly to trial for treason. The grounds there asserted by the Appellate Court for making reversal mandatory, are no less applicable in the case at bar. It was pointed out that while the matter of severance is for the trial court's discretion, it is subject, however, to review if abused. The court made it clear that even if, at the outset of the trial, the reasons may not seem clear, a severance must be granted even at the end of the trial, when the need appears.

[13] That the theory of one joint scheme was more fiction than fact is evidenced by the following episode at the trial: The defendant, Grow, after the trial had progressed five months, moved for dismissal of the indictment as to him, and to which the prosecution consented, making the following startling assertion:

> "that while there is evidence showing that Mr. Grow did in fact defraud certain customers, there is no evidence showing in his case alone that he was part of the scheme and that he conspired." (R. 8827).

Yet it is demonstrable from the record that the type of testimony involving Grow, and the surrounding circumstances were quite the same with respect to him as the government utilized in prosecuting the other defendants. The frauds were no less individual in other cases than in the case of Grow; and if the alleged conspiracy or conspiracies truly encompassed all the defendants, as the government contended, then the web included Grow no less than it did the others. Justification for the dismissal of the indictment as against Grow could with equal logic be applied in the case of every other defendant—thus relegating them to answer for their alleged frauds in the state courts.

Two types of testimony admitted in the *Haupt* case, (1) to show "background", and (2) incriminating statements offered only as against individual defendants, presented the same basis for objection that we have here—except that in the instant case the prejudice was aggravated by the ruling of the Court *that the evidence was binding on all defendants.* The Seventh Circuit held that both types of testimony were bound to prejudice the other defendants, and that not only a jury, but *even a court* could not be counted on to allocate the damaging testimony to the proper defendant, and to the exclusion of the others, stating as follows, at p. 672:

> "We doubt if it was within the realm of possibility for this jury to limit its consideration of the damaging effect of such statements merely to the defendant against whom they were admitted. We have equal doubt that any jury, or for that matter any court, could perform such a herculean feat.
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> We are unaware of any procedure which the trial court could have devised, other than a severance, by which these incriminating statements could have been introduced against the defendants making them, without seriously prejudicing the rights of other defendants."

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at p. 673,

> "Here again, this background testimony as to each defendant was offered only as to that particular defendant and the jury was instructed that it was to be only so considered. We seriously doubt, however, if it was possible for the jury to limit its damaging effect to the particular defendant against whom it was admitted."

A severance, in the interest of common fairness and simple justice was, we submit, mandatory in the instant case.

The language in the *Haupt* case on this subject is apposite (p. 673):

> "However, after the trial and all of the evidence as to the so-called background of certain defendants had been heard and the fourteen incriminating statements admitted and the overt acts had been considered, the defendants, by motion for new trial, again appealed to the trial court's discretion to relieve them of the unfair and prejudicial consequences of a joint trial. Then the court had to consider the task of the jury, which had to keep separated in its mind the involvement of the various defendants in the numerous overt acts, to eliminate from the incriminating statements those parts which involved defendants other than the one against whom such statement was admitted, and to consider only as to such defendant the acts and utterances comprising the so-called background testimony as it related to such defendant. We think that if these facts had been known to the trial court at the time the motion for severance was made, it would have been an abuse of discretion for the trial court to have refused a severance. When presented again in the motion for a new trial when all of these facts and circumstances were known to the court, it was likewise an abuse of discretion to overrule such motion and thus refuse to remedy this prejudicial procedure."

The appellant Cohen was helpless in the labyrinthine ramifications of this case and the multiplicity of transactions put in evidence, although factually over ninety per cent of the record did not even purport to involve him in any way whatsoever. Caught in the quagmire of variance, misjoinder of offenses and of defendants, admission of evidence of offenses with which he had no connection, which were barred by limitation, which took place beyond the court's jurisdiction, appellant was branded with all of this because, though involving other defendants, and offered to show "association" and "background" (as stated by the

court and prosecution), it was made binding upon all the defendants, including Cohen, and yet, not even in the remotest fashion, related to him.

Surrounded by this mountain of prejudice, Cohen was doomed in advance to a verdict of guilt. It is our contention that long before the trial had reached its advanced stages, the need for severance should have been crystal clear to the court, and should have been directed, if not on the court's own motion, then clearly on the application of the appellant, during or at the end of the trial.

The trial judge himself was aware that the limitations of memory made analysis of the case by the jury quite impossible, stating:

> "• • • *when you get to a case of this character, with 29 counts, with 70 or 75 or 80 defendants, and then a generalized count of conspiracy, we have to measure human memory. The Court has to consider that the human mind is able to retain just so much. Very few of us could be on that jury and skeletonize that case at that end of four or five weeks without any notes. I have known very few lawyers that could even make an argument to the jury after having been in court for several weeks.*" (R. 499) (Emphasis supplied).

A reading of the entire record will demonstrate, beyond the peradventure of doubt, that the poison injected into this trial day after day, by these numerous episodes of fraud and wrongdoing, left it humanly impossible for the jury to appraise and apply the testimony, without visiting the wrongs of one upon all the others.

The substance of appellant's contentions, as outlined above, have thus been expressed in *Marcante* v. *United States*, 49 F. (2) 156, 158 (10th Cir.):

> "Furthermore, the practice of submitting to a Jury, in one trial, the question of the guilt of thirty or fifty citizens, where the testimony as to each is different,

> is not to be encouraged. It is extremely difficult for an experienced trial judge to trace the skeins of scattered testimony to so many individuals; with inexperienced jurors, such complicated testimony is too apt to become a confused jumble, and a verdict too apt to represent an impression that the defendants are guilty of something, with little reference to the crimes with which they are charged."

The menace of mass prosecution was warned against by L. Hand, J., only a few years ago in *Falcone* v. *U. S.* (2nd Cir.) 109 F. (2) 579.

In *U. S.* v. *Liss*, 137 F. (2) 995, Jerome Frank, J., in his outspoken dissent, states, at p. 1004:

> "But a trial even for a single conspiracy is complicated. The complexity of such a trial should not be increased by needlessly injecting into it the trial of another conspiracy. *More ought to be done, I think, to prevent prosecutors from employing the excuse of need for 'expedition' to use, unnecessarily, conspiracy trials, in which large numbers of defendants are herded into one suit, instead of bringing several actions.* The trial dockets are not so congested as to compel such omnibus trials."

The Supreme Court, it is believed, will discern the overpowering injustice and evil in mass prosecution, and the very real danger that innocent men may easily be sucked into the vortex of guilt by such a trial.[14]

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[14] Counsel will not here present a detailed discussion of the extreme prejudice caused by the malicious deportment and vituperative tirades of the witness, Mussman, against both appellant and appellant's counsel, Mussman's reprehensible tactics did not escape the notice or appraisal of the Court of Appeals (op. pp. 2247, 2257, 8). That there was thereby created an unfair trial for the appellant can be discerned from a reading of the record of Mussman's *six weeks of testimony of over 3,000 pages*. In this way only, can there be gained the fullest appreciation of the venom and spleen of this witness, who had admitted a long life

On the basis of this record disclosing a wide departure from well established and well recognized judicial principles, it is urged that the Supreme Court exercise its supervisory power to rectify the grave errors of these proceedings.

POINT II

A Mass Prosecution of Nonrelated Conspiracies, with a Misjoinder of Defendants and of Offenses, Cannot be Justified under the Doctrine of Berger v. U. S., 295 U. S. 78. The Variance in the Instant Case Was Clearly Material, and Reversal is Mandatory Because of the Obvious Practical Prejudice to the Accused

It is believed that the most grievous legal error in this entire case is the tortuous construction that has been given to the doctrine of immaterial variance in *Berger* v. *U. S.*,

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of crime, and his ruthless program calculated to crucify appellant for his own sordid purpose.

Mussman was handled by the court, not without solicitude, and was subjected to practically no restraint—an added aspect of prejudice which the record clearly discloses.

The analysis of the court below of this phase of the trial, in the following language, is bewildering:

> "Next as to the conduct of the judge. It is true that he put little or no restraint upon Mussman; but no harm could have come from that. He was a confessed, unblushing rogue, admittedly concerned with making a case against the accused, partly in the hope of leniety for himself, partly apparently from malice. His outbursts of violent abuse against them may well have been so unseemly that, in the interests of decorum alone, the judge should have checked him; *but it is extremely unlikely that they hurt the accused a particle.*"

The conclusion of the Court of Appeals that all this abuse was inconsequential and unprejudicial, and that, as for Mussman's epithets, "it is extremely unlikely that they hurt the accused a particle", is most perplexing. That certainly is "*unverified and unverifiable guessing*" (per Jerome, Frank, J., in his dissenting opinion in *U. S.* v. *Liss*, 137 F. (2) 995, 1003). This conclusion, we submit, betrays the disinclination of the Second Circuit to reverse even for substantial error—a subject which is more fully discussed under Point VIII, *infra*.

295 U. S. 78, as justification for this mass trial. From a relatively innocuous beginning, in which the Supreme Court held that two related conspiracies involving the same defendants would not be deemed prejudicial variance although the indictment alleged one conspiracy, the lower courts have now metamorphosed the principle into a concept that has become incredibly grotesque.[15]

Detailed discussion surely is not needed to demonstrate the great contrast and distinction between the *Berger* case and the case at bar. Surely it is a far cry from the simple type of variance in the *Berger* case to a prosecution, such as we have here, of seventy-five defendants, and offering, as the proof under an indictment alleging a single conspiracy, evidence involving five hundred transactions with respect to over two hundred conspiracies. Even in the most optimistic view taken by the Government, as suggested by the Court of Appeals, there were a number of conspiracies that may have interpenetrated, and yet the conspirators in each conspiracy were concededly wholly different.

It is time, we submit, for the Supreme Court to set up some guide or standard to establish the limitations of the doctrine of immaterial variance asserted in the *Berger* case.

Surely the *Berger* case was never intended to serve as authority for the proposition, as the 2nd Circuit has implied by sustaining the convictions here, that under an indictment alleging a single conspiracy there is immaterial variance where the proof develops that there are many conspiracies (a) some, if not all of which, are unrelated; (b) some are barred by the Statute of Limitations;

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[15] Not one of the ten cases cited by the Court below (op. p. 2252, footnote), as instances of how the *Berger* case has, in practice, been followed, remotely resembles the instant case in complexity of indictment, or issues, or totality of defendants, or of conspiracies, or of offenses joined.

(c) some occurred beyond the court's jurisdiction; (d) some are not Federal offenses at all, because no use of the mails was made or intended; (e) in which, severally, the defendants are different; (f) the proof with respect to which is not the same in each instance.

Such type of joinder has been condemned and held reversible in many cases of which the following are examples:

U. S. v. *McElroy*, 164 U. S. 76;
Coco v. *U. S.* 289 F. 33 (8th Cir.);
Wilson v. *U. S.* 109 Fed. (2d) 895 (6th Cir.);
Ventimiglio v. *U. S.* 61 Fed. (2d) 619 (6th Cir.);
U. S. v. *Siebricht*, 59 Fed. (2d) 976 (2nd Cir.).

The Supreme Court did not and could never have intended the doctrine of immaterial variance to get so far out of hand as to be utilized as authority to justify the instant mass prosecution. The instant case, which has become a *cause celebre* for length of trial and complexity, should not, we submit, under the aegis of the *Berger* case, become a precedent for prosecutions more evil in design, and compass and effect.

Point III

The Court of Appeals Erred in Ruling (Concededly Contra to the Great Weight of Authority) That the Statute of Limitations is Not a Bar to a Conspiracy in Which the Last Overt Act Found Was More Than the Statutory Period Prior to the Indictment

For the purpose of the present application for a writ of *certiorari*, perhaps little need be added to the discussion of this subject beyond that contained in the opinion of the court below.

According to L. Hand, J., this is the question "*which raises the only really important doubt in the whole trial*", (op. p. 2262), and his opinion states:

> "The accused argue that, since the judge did not take these four [16] acts away from the jury, it is possible that the only acts they found were these, or some of them; and that, if so, the statute was a bar, because it begins to run from the last overt act found. *This argument is formally good, if the law is good, and there is undoubtedly authority for the proposition that the period does so run*" (emphasis supplied).
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> "It must be owned that there is a body of authority, as we have said, that the statute of limitations runs from the last overt act which has been proved. In addition to early decisions in the district and circuit courts, the Eighth Circuit has so declared in *Ware v. United States*, 154 Fed. Rep. 577, and in *Culp v. United States*, 131 Fed. (2) 93, 100; so has the Ninth in *Jones v. United States*, 162 Fed. Rep. 417, 425 and in *Hedderly v. United States*, 193 Fed. Rep. 561, 569; and so has the Court of Appeals of the District in *Lorenz v. United States*, 24 App. D. C. 337, 387. Indeed, in *Brown v. Elliott*, 225 U. S. 392, 401, a passage to that purport from *Lonabaugh v. United States*, 179 Fed. Rep. 476, was quoted with apparent approval. However, all these decisions were upon records where there had been an overt act within the statutory period, and where it was therefore not necessary to decide the point. The only decisions that we have found in appellate courts, which demanded a decision on the point are two in the Eighth Circuit: *Lonabaugh v. United States* which we have just cited, and *McWhorter v. United States*, 299 Fed. Rep. 780, which curiously enough, did not cite *Lonabaugh v. United*

[16] The reference to "four acts" is an error of the lower court. There were *five*, being overt acts 1, 2, 3, 4 and 29; each of them dated before September 30, 1935.

States. On the other hand we cannot read *Kissel v. United States,* 218 U. S. 601, in any other sense than as contrary to such a notion" (op. p. 2263).

It will be seen from the foregoing that the great weight of authority is concededly contrary to the position that has been asserted by the Second Circuit. We submit that there is no suggestion in any case of conspiracy, reported in the books, in recent years (outside of the opinion of the Second Circuit in the instant case), which casts any doubt upon the well established rule that the Statute of Limitations runs from the last overt act which has been found.

The paramount importance of this whole question in the instant case arises out of the crucial rulings of the trial judge, during the trial and in his final charge, to the effect that *any* defendant could be found guilty upon *any one* of the overt acts. The Court refused to withdraw from the jury *any one* of the overt acts, not excluding the five in question which were all laid before September 30th, 1935.

Since, as a matter of fact, *only seven* of the overt acts were linked with the appellant Cohen (despite the factual misconception involving him with many others, asserted in the opinion), the likelihood was much more than theoretical,—in fact it was highly probable—that the *appellant Cohen was indeed adjudged guilty on the basis of one of these outlawed overt acts.* Hence L. Hand J.'s observation that "the possibility was so remote as to have the least possible practical importance" is an unfortunately grave inaccuracy.

The cogent reasons as above stated, and as the court below has discerned, demonstrate that the validity of the conviction on the conspiracy count, depends upon the proper applicable rule with regard to the Statute of Limitations.

Counsel for the appellant is of the view that the lower court's thesis for upsetting the law on this subject is entirely untenable, in view of the state of the statutory law that the mere conspiracy is not a crime, and that only the overt act, when done, makes the conspiracy a crime. *The logical conclusion, following L. Hand J.'s reasoning would be to assert that there is no statute of limitations at all in conspiracy cases.* For the purpose of *certiorari,* it should suffice to observe that the great weight of authority, including *Brown* v. *Elliott,* 225 U. S. 392, supports the pronouncement on this subject which is in direct contradistinction to that which was enunciated by the court below.

The Supreme Court, in *Brown* v. *Elliott,* (as L. Hand, J. below, observed) quoted the following, with apparent approval, and with copious citation, from *Lonabaugh* v. *U. S.,* 179 F. 476, in the course of its opinion, 225 U. S. 392, at p. 401:

> "And where, during the existence of the conspiracy, there are successive overt acts, *the period of limitation must be computed from the date of the last of them of which there is an appropriate allegation and proof,* and this although some of the earlier acts may have occurred more than three years before the indictment was found" (emphasis supplied).

The views of L. Hand, J. with respect to *Kissel* v. *U. S.,* 218 U. S. 601, as specifying "a contrary notion", seem quite untenable since the *Kissel* case itself is analyzed by the Supreme Court in the course of its opinion in *Brown* v. *Elliott,* 225 U. S. 392. Surely the Supreme Court cannot be deemed to quote with "apparent approval" the well recognized rule as to the Statute of Limitations commencing to run from the last overt act, and then, without suggesting a contrary thought or view, to consider that principle

as nullified by implication through the discussion of the *Kissel* case which does not involve the question of either conspiracy or overt acts.

Point IV

The Court of Appeals Erred in Ruling That Section 557 of Title 18, U. S. Code, Permits the Joinder of Crimes When the Accused Are Different, a View Which is Concededly Contrary to That Adopted in the Eighth Circuit and With Regard to Which There Has Been Dissent in the Second and Seventh Circuits

The court below, in an effort to justify the variance at the trial as immaterial, suggests that instead of the single conspiracy alleged, there were three conspiracies, and then raises the question whether the variance was material because the alleged conspirators were not the same in all.

L. Hand, J. points out in the opinion below that there is a diversity of decision in the Circuits. His discussion on the subject is as follows:

> "For this reason, as we pointed out in *United States v. Liss*, supra (137 Fed. (2) 995), the problem is strictly speaking rather one of joinder under § 557 of Title 18, U. S. Code. The case at bar is an apt example of just that; and the question is the same as though all three supposititious 'schemes' had been pleaded as separate counts. Certainly they would have been crimes of the same kind, and, for the reasons we have given, their joinder would have certainly been 'proper,' unless for the fact that the confederates were not the same in all. It is true that the Eighth Circuit in *Coco v. United States*, 289 Fed. Rep. 33, held that § 557 did not permit the joinder of crimes when the accused were different, but we held the opposite in *United States v. Twentieth Century Bus Operators*, 101

Fed. (2) 700, and so has the Seventh Circuit, though by a divided court (*United States v. Tuffanelli*, 131 Fed. (2) 890, 893, 894)." (op. p. 2252, 3)

That there is real clash of authority is obvious from the fact that while the Eighth Circuit clearly holds that a joinder of crimes is not permissible when the accused are different, both in the Second and Seventh Circuits, the opinions cited for the opposite view, are in each case by a divided court.

In *U. S.* v. *Tuffanelli*, 131 Fed. (2) 890, the dissenting opinion is by Major J. and his main reliance is upon *McElroy* v. *U. S.*, 164 U. S. 76. In the Supreme Court the law was thus stated in *McElroy* v. *U. S.*, 164 U. S. 76, at p. 81:

> "While the general rule is that counts for several felonies of the same general nature, requiring the same mode of trial and punishment, may be joined in the same indictment, subject to the power of the Court to quash the indictment or to compel an election, such joinder cannot be sustained where the parties are not the same and where the offenses are in no wise parts of the same transaction and must depend upon evidence of a different set of facts as to each or some of them. It cannot be said in such case that all the defendants may not have been embarrassed and prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions."

The law on this subject, as discussed in the portion of the opinion by L. Hand, J. above quoted, should suffice to indicate that here is a major question of criminal law which requires exposition and solution by the Supreme Court.

Point V

The Circuit Court of Appeals Erred in Holding (Concededly Contrary to a Body of Substantial Authority), That Appellate Review Need Be No More Exacting in Criminal Than in Civil Cases

The Circuit Court of Appeals asserts the arresting proposition that the same evidence which will support a civil verdict will be sufficient to support a criminal verdict; and that appellate scrutiny need be no more exacting in either type of litigation.

While pointing out that "*there is indeed authority for that position*", the Second Circuit does not accept that principle. Relying on two of its prior decisions (*Feinberg* v. *United States*, 140 Fed. (2) 592, 594 and *United States* v. *Andolschek*, 142 Fed. (2) 503, 504; opinions written by L. Hand, J.), the Court below holds that it is wrong to "*assume that an appellate court, before affirming a verdict in a criminal case, will demand that the evidence shall be more cogent and persuasive than when reviewing a civil verdict*: i. e. *that, since the jury must be satisfied of the accused's guilt beyond a reasonable doubt, an appellate court will more straitly scrutinize the evidence necessary to sustain the verdict*". (op. p. 2245).

We believe that the mere statement of this proposition, thus asserted in the opinion below, suggests the profound importance of the question; and that in view of the recognition that there is authority *contra*, a restatement of the law on this subject would be valuable and timely.

It is the view of counsel for the appellant that the concept of appellate appraisal, as expressed by the Second Circuit, is fundamentally unsound; and that in this case, it cast its aura over the entire panorama of this exceptional

trial. Clearly it affected the psychological approach of the appellate bench in examining the trial proceedings—to the obvious detriment of the accused. The problem of appellate review is of no mere academic importance. It is a basic one that plumbs the depths of the court's reaction to the record as a whole.

The determination of what constitutes proper and appropriate appellate analysis in a criminal cause, in which life and liberty are at stake, is a matter of first importance in the administration of justice, and constitutes a subject which merits the deliberative consideration and exposition of guiding rules by the highest court in the land—particularly when, as the opinion below indicates, there is a body of contrary authority.

Point VI

In Ruling That Since, As a Practical Alternative, Persons Charged With Conspiracy Must Either Be Subjected to a Joint Prosecution and the Danger of an Unfair Trial, or, on the Other Hand, Obtain Immunity, and That Therefore the Accused Must Accept That Risk, the Second Circuit Expresses a Doctrine Which is Violative of the Constitutional Guarantee of a Fair and Impartial Trial

The Court below, in its opinion, states:

> "The chance that a joint trial will not as to them be a fair trial, has to be balanced against the fact that it is a joint trial or none." (op. p. 2268)

We submit that the foregoing pronouncement of the court below is utterly unsound, and should not be sanctioned by the Supreme Court.

To say that an unfair trial may have to be condoned, accepted and justified in joint trials for conspiracy is to

recognize a new and treacherous departure from well established and traditional safeguards in the criminal law.

The opinion below asserts:

> "We are dealing only with the chance, and chance alone it is, that a jury may fail to distinguish between the guilty and innocent; and in deciding the importance of that chance, we must not disregard the only available alternative." (op. p. 2257)

The Constitution guarantees a fair and impartial trial. To this the accused is entitled as a matter of right. *There is no alternative.* No consideration or circumstance or condition can justify the opening up of any avenue for the curtailment of this basic right under the Constitution. If there is not fair trial, a verdict must be set aside. *If there can be no fair trial,* then the demands of American justice are that the accused be immune. The innocent may not be forced to suffer from being linked by the government with the guilty. The inherent vice in mass prosecution is the foisting of the guilt of demonstrably guilty men, by a form of legal osmosis, upon a host of others, who are herded *en masse* into a single trial for the convenience of the prosecutor. It will not do for the courts to shrug their shoulders and say that an unfair trial is unavoidable. The fact is that in this case severances were granted, and many more could, and should have been, granted.

Immunity, in these cases, is in fact but a myth. Much of what passed before the jury consisted of violations of State laws. None of the accused, in truth, need have been immune from punishment for their malefactions. But in common justice, they would have been tried for their *own* crimes, if they were indicted separately, or in very small groups.

There is no imperative need to bind up a variety of simple mail frauds with an omnibus conspiracy count.

Whether the defendants were tried for mail fraud in the Federal Courts or for cheating in the State Courts, there would never have been required for these seventy-five defendants seven months of trial. There would have been instituted a series of smaller trials, lasting a few days each. And beyond that, and what is more important, there would have been obviated the danger which applied to most defendants, for to them the involvement in a single gigantic scheme was pure fantasy, and yet the futility and burden of a proper defense, of necessity, constituted a veritable nightmare.

The jury should determine the guilt of an accused not upon the basis of the unsavory background of his co-defendants, or of his alleged association with others. Jurors are human, and because of the limitations of memory and discrimination they may, no matter how well intentioned, as a result of such a morass of evidence, paraded in a long steady stream before them for over one-half a year, inevitably visit the guilt of some upon all.

Point VII

The Court of Appeals Erred in Approving the Ruling of the Trial Judge Rejecting in Toto All Requests to Charge, Though They Correctly Stated Principles Applicable to Crucial Phases of the Trial, and Not Embraced in the Main Charge. In Adopting This Policy (Concededly Contra to That Applied in Other Jurisdictions), the Court below Expressed a Doctrine Which Paves the Way for a Precarious Curtailment of the Rights of an Accused

The Judge's charge which consumed only forty-five minutes, following so lengthy and complicated a trial will, on its face, disclose its insufficiency and inaccuracies. It was replete with erroneous, argumentative, discriminatory,

contradictory, incomplete, indefinite, unclarified, meaningless and confused statements. It was therefore preeminently essential for the court to pass upon the requests to charge—most of them containing correctly worded legal propositions taken from recent appellate opinions of the Federal courts, and many of them either not covered at all, or inadequately or incorrectly stated in the charge.

Surely some three hundred requests, coming from counsel *for all parties on trial after a seven months' session,* cannot be considered so burdensome as to justify rejection in *toto.*

Only one-third of these requests were submitted by the appellant Cohen; and of these, about seventy were formal in structure—separately worded requests to cover each of the listed representations (forty-one) and each of the overt acts (twenty-nine) and asking for their withdrawal from the jury *seriatim,* as unproved or outlawed.

The decision below, in this regard, is in conflict with the applicable decisions of the Supreme Court.

Thorwegan v. *King,* 111 U. S. 549, supports the view of appellant.

See also *Egan* v. *U. S.,* 287 F. 958;
cf. *Bruno* v. *U. S.,* 308 U. S. 287, 92.

The Court of Appeals in the opinion below upholds the ruling of the trial judge, but adds:

> "*It is true that in many jurisdictions such requests are taken more seriously than we take them.*" (op. p. 2262)

The question here presented is one of paramount significance in the conduct of criminal trials. Justice may be denied or frustrated by improper application of the rule as to requests to charge. The recognition by the Second Circuit "that in many jurisdictions such requests are

taken more seriously'' suggests a sharp clash of opinion on the weight, value and importance of proper requests to charge.

We submit that the view on this subject, as expressed by the Second Circuit, constitutes a most serious departure from established practice and procedure. The Supreme Court should, in the light of this expression of views by the Court of Appeals, enunciate appropriate rule and policy on this subject, lest this ruling of the Second Circuit serve as a signpost to weaken the whole institution of the charge to the jury—and it is permitted to dwindle away to a mere requirement of a ''colloquial charge''. This would pave the way for a precarious curtailment of the rights of an accused.

Point VIII

Since the Second Circuit Does Not Apply the ''Harmless Error Doctrine'' in Conformity with the Supreme Court Rule in McCandless v. U. S., 298 U. S. 342, and in the 5th, 7th, 8th, 9th and 10th Circuits, the Substantial Prejudicial Errors in This Record, Singly and in the Aggregate, Were Not Accorded Proper Analysis and Appraisal as Demanded by Law

Toward the end of its opinion, the court below asserts:

> ''The foregoing are the only questions which we shall discuss; for the rest, *even were they errors*, we should not because of them reverse convictions so just upon the merits.'' (Italics ours) op. p. 2265.

We respectfully submit that in this record there was an impressive array of predudicial material and legal error of sufficient moment, singly or in the aggregate, to justify a reversal of this verdict.

It is our contention that these were not ''harmless errors'', and that reversal was obligatory according to the

rule as laid down by the Supreme Court in *McCandless* v. *U. S.*, 298 U. S. 342.

The Supreme Court, in that case (after quoting the "harmless error" statute, 28 U. S. C. A., Sec. 391), said:

> "This, as the language plainly shows, does not change the well settled rule that *an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial.*" (Emphasis supplied)

The "harmless error statute" was intended, as the Supreme Court points out in *Bruno* v. *U. S.*, 308 U. S. 287, 294, merely

> "• • • to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict."

There has obviously been considerable ferment in the Circuit Court of Appeals for the Second Circuit over the "harmless error" rule. See the dissenting opinion of Jerome Frank, J., in *Keller* v. *Brooklyn Bus Corporation*, 128 F. (2) 510, 514. See also dissenting opinion of Jerome Frank, J., in *U. S.* v. *Liss*,[17] 137 F. (2) 995, 1005, and cases and discussion in the footnotes to said opinion.

L. Hand, J., in *U. S.* v. *Liss*, 137 F. (2) 995, at p. 999, states (for the majority opinion) that:

> "*There is a modern disposition to assume that an error has been harmless.*"

This is an inaccurate statement, and it is one difficult to comprehend, in the light of the very clear and unmistakable

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[17] In *U. S.* v. *Liss*, the opinion was written by L. Hand, J., and concurred in by Swann, J., two of the judges who composed the Bench disposing of the instant appeal (Jerome Frank, J., was not one of the Judges below).

language of the Supreme Court and of five other Circuits,[18] which are quite to the contrary.

Since 1936 by the decision of *McCandless* v. *U. S., supra,* 298 U. S. 342, there can be no doubt as to the position of the Supreme Court on the subject of "harmless error", and that is, unequivocally, that the presumption is that error is prejudicial—and the presumption is not the reverse, as stated, in the opinion below (See *Bruno* v. *U. S.,* 308 U. S. 287).

The cases in the five Circuits, placed in juxtaposition to the view of the Second Circuit that there is "a modern disposition to assume that an error has been harmless", highlights the entire problem, and should, in itself, serve as a warning that the errors in the instant case have not been dealt with in accord with the rule as laid down by the Supreme Court in the *McCandless* case.

As stated in *Worcester* v. *Pure Torpedo Co.* (7th Cir.), 127 F. (2) 945, at p. 947:

> "Moreover, the argument continues, the record discloses the verdict for the defendant was the only verdict that justice could approve, therefore the plaintiffs were not prejudiced and the errors were harmless. 'While this court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was committed, *it is well settled that a reversal will be directed unless it appears, beyond doubt, that the error complained of did not and could not have prejudiced the rights of the party.*' "

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[18] 8th Cir. *Fort Dodge Hotel* v. *Bartelt,* 119 F. (2) 253, 9.
5th Cir. *Farris* v. *Interstate Circuit Inc.,* 116 F. (2) 409, 12.
7th Cir. *Worcester* v. *Pure Torpedo Co.,* 127 F. (2) 945, 7, 8.
9th Cir. *Lynch* v. *Oregon Lumber Co.,* 108 F. (2) 283, 5, 6.
10th Cir. *Little* v. *U. S.,* 73 F. (2) 861, 866.

The first five of these were *civil* causes, and yet judgments were reversed in each instance because, as the Courts indicated, that since the Court cannot be certain that the jury was not affected by the error, it must be presumed as a matter of law that reversible error was committed.

In *Little* v. *United States*, 73 F. (2) 861 (10th Cir.), a criminal conviction was reversed because of what the court admitted might appear to be a harmless error, namely, the court stenographer reading the judge's charge to the jury in the jury room. The opinion states as follows, at p. 866:

> "We conclude that where the entire record affirmatively discloses that an error has not affected the substantial rights of an appellant, it will be disregarded. *But where error occurs which, within the range of a reasonable possibility, may have affected the verdict of a jury, appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence their verdict.* So to hold would, as a practical matter, take from a defendant his right to a fair trial. In this case we know nothing of what went on while the stenographer was in the jury room; it is entirely possible that a shorthand character was misinterpreted; emphasis plays an important role in transmission of ideas by word of mouth, and the difficult injunction of the court to avoid any emphasis is no assurance that there was none. What else may have occurred, we do not know. No outsider has any business in the jury room; much harm could result, and that is enough. *The record failing affirmatively to disclose that no prejudice did result, the verdict cannot stand.* (Emphasis supplied)

There is ample reason, we submit, not to bypass the various errors, urged by appellant, either those discussed or those which the court below declined to pass on (and waved away with the words "even were they errors, we should not because of them reverse convictions so just upon the merits") (op. p. 2265).

We urge this, especially in the light of the intellectual schism in the Second Circuit, which makes it patent that the "harmless error doctrine" is not viewed in accord

with the rule expressed in the Supreme Court, and five other Circuits.

A serious outgrowth of this position taken by the Second Circuit, and which vitally affects its disposition of criminal appeals, appears to be the process of *rationalization* by the judges therein of their decision to affirm, despite error, to justify upholding a verdict of guilt.

An affirmance by the Second Circuit, even when error is shown, appears to rest on the *assumption* by the judges that if, from the record, the guilt seems clear, and the decision *to them* appears as just on the merits, they may, by agreeing with the jury's decision (albeit the jury was subjected to the influence of error), determine the case by accepting and making as their own the jury's contaminated finding.[19] And that is just what transpired in the instant case, when the court asserts "for the rest, *even were they errors,* we should not because of them reverse convictions so just upon the merits". (op. p. 2265)

May it not very well be that if those "errors" had not been committed, there would have been a different verdict?

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[19] Jerome Frank, J., one of the judges in the Second Circuit, has expressed vigorous views on this subject, in dissenting opinions in both civil and criminal cases (*Keller* v. *Brooklyn Bus Corporation,* 128 F. (2) 510, 514 and *U. S.* v. *Liss,* 137 F. (2) 995, 1001. In the *Liss* case, Judge Frank states, at p. 1001:

> "As I understand the fundamental principle of the jury system, we appellate judges do not sit as a jury. It surely follows that we ought not to sustain a verdict of guilty after an unfair trial merely because, upon reading the printed record, we believe that, had we been the jury, we would have convicted. Any other rule has the result that the presence of the jury will often become a mere formality; for then, if only the jury finds guilt, no matter by what unfair tactics it was persuaded to do so, we judges, in actual fact, decide the case."

Counsel for appellant, upon the basis of these views of Jerome Frank, J., are emboldened to register their protest against the glossing over of error by the court below, on the assumption that the defendants are guilty merely because the jury so found, *despite the fact that the jury so found in a trial where the errors may have clearly influenced their decision.*

And if that is so, can it justly be said that an Appellate Court has the right to sustain a conviction which was achieved by errors (and thus, in law, by unfair means), and in this way take away from the jury their proper fact-finding function. *That fact-finding function must be at a fair trial where there are no substantial errors.*

The procedure of the Second Circuit constitutes merely a substitution, on questions of fact, by the Appellate Court of *its* decision, for the jury's decision, although the sovereign right to find the facts is with the jury. The harmless error doctrine of the Supreme Court, does not permit of appellate fact-finding, as a substitute for jury fact-finding. It demands the very opposite. Once error does appear, then a reversal is mandatory, unless, as the Supreme Court states, "it *affirmatively*[20] appears from the whole records that it was not prejudicial". (*McCandless* v. *U. S.* 298 U. S. 342).

The policy of such a personalized judgment which Appellate Courts are prone to give, when they presume guilt in the record, irrespective of error, inevitably must become a cancerous growth on the body of the criminal law, utterly destroying any vestigial value of jury trials.

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[20] It is noteworthy that the Supreme Court cited *Fillippon* v. *Albion*, 250 U. S. 76, and the word *"affirmatively"* was italicized in the *McCandless* opinion by the Supreme Court.

Point IX

The Court of Appeals Erred in Failing to Hold as Reversible Error, as to Appellant Cohen, the Receipt in Evidence, and the Reading Verbatim to the Jury, of the Legal Opinion of the Circuit Court of Appeals (10th Cir.) in the Wholly Unrelated Mail Fraud Trial Respecting the Conviction Therein of the Co-Defendant, Joel Rosenberg, for a Similar Type of Mail Fraud, and Which Was Reversed on Appeal (Rosenberg v. U. S. (10th Cir.), 120 F. (2) 935)

In a startling move at the trial, the prosecutor offered in evidence, in the course of the cross examination of the co-defendant Joel Rosenberg, the opinion of the 10th Circuit in the case of *Rosenberg* v. *U. S.*, 120 F. (2) 935, which related to said defendant but which in no way involved, (or claimed by the prosecutor to involve) any aspect of the instant prosecution. The prosecutor read this appellate opinion *verbatim* to the jury allegedly to show that though the conviction in that case was reversed, the accused was nonetheless guilty because the decision turned merely on the lack of proof of mailing.

The Court of Appeals erred in justifying the procedure, which is in defiance of the authorities that pronounce such practice as prejudicial and illegal, since thereby the fount of legal instruction to the jury is not restricted, as it must be, to the trial judge. The legal opinion of no other tribunal may be permitted directly or impliedly to affect the jury as to the law of the case.

The justification for this in the instant case, as ruled, in the Court below (op. p. 2267), misses the point entirely, *for it does not even mention the objection as it affects the appellant Cohen.* It is as against Cohen that this extraneous legal opinion constituted most violently prejudicial error and irreparable injury. This was especially

true in view of the fact that the 10th Circuit case involved substantially similar questions of law and fact.

The impact of that opinion, as against the appellant Cohen, could not conceivably be deemed harmless. It was irretrievably prejudicial, and constitutes, we submit, the clearest ground for reversal.

The contention here advanced was the precise point upon which a verdict was reversed in *Brown* v. *U. S.*, 298 F. 428 (cited with approval in *Baush Machine Tool Co.* v. *Aluminum Co. of America*, 79 F. (2) 217, 226.

In *Press Publishing Co.* v. *McDonald* (2nd Cir.) 63 F. 238, 248, it was stated, as ground for reversal, referring to the reading of a legal opinion from another Court,

> "* * * *we cannot say that it may not have influenced the jury in deciding the very question which was submitted to them.*"

This profound error represents such a departure from well established legal procedure, sanctioned by both the District Court and the Circuit Court of Appeals, as to require the invocation of the supervisory power of the Supreme Court.

Point X

The Circuit Court of Appeals Erred in Holding as Non-Reversible Error the Mode of Interrogation, Adopted by the Prosecutor in Cross-Examination of Appellant, by Which He Imputed, by the Affirmations in His Questions, Criminal Convictions to the Employees of the Appellant (Which the Court below Conceded to be "Improper") and the Commendation by the Trial Judge of Said Interrogation, after the Court Had Previously Taken an Antithetical Attitude toward Similarly Phrased Questions, Asked by Appellant's Attorney

The Circuit Court of Appeals in its opinion refers to the conduct of the prosecutor in his cross examination of

the appellant Cohen. It admits that by the form of the questioning, in imputing a record of criminal convictions to the employees of Joseph Cohen, the prosecutor acted improperly, stating:

> "It is quite true that in the case at bar the questions were so put as to show that the prosecutor meant to assert that Cohen's associates have all been in fact convicted; *and that was improper*" (op. p. 2259) (Emphasis supplied).

What the Court below obviously misapprehended was the *added approbation* of the trial judge, and his words of commendation, to this mode of questioning by the prosecutor.

When appellant's counsel vigorously objected, on the ground that statements of fact were being included in the prosecutor's questions without supporting evidence, and it was insisted that the questions should not be considered *as evidence,* the court, referring to the prosecutor, stated:

> "*We are presuming that being a sworn officer of the law, he would speak rather carefully*" (R. 1295) (Emphasis supplied).

The net result of this ruling was that, so far as the minds of the jury were concerned, the Court, in utilizing the language as quoted, put its *imprimatur* upon the factual integrity of the basis of the prosecutor's questions. The vital and prejudicial error, which the court below has recognized to be "improper", was in the prosecutor presenting questions *as evidence,* i. e. making the prosecutor's inquiries appear as *proof.* But, what was more prejudicial was the *added judicial sanction,* as exemplified in the attitude of the court when objection was made thereto.

The error of the trial judge appears, in bold relief, when placed in juxtaposition with the previous ruling of the Court to similarly phrased questions, asked by Cohen's attorney (R. 12943).

It is submitted that in the midst of a mass prosecution, the innuendo which follows from questions thus improperly presented *as evidence* by the prosecutor, coupled with the apparent judicial sanction by the Court as to the prosecutor's conduct—although previously a contrary and stern attitude was adopted towards counsel for the accused for like questioning—must have had a most deadly effect in sealing Cohen's fate.

The vice of such a situation was discussed and was made the basis of reversal in *Berger* v. *U. S.*, 295 U. S. 78, where the Supreme Court, in discussing kindred matter, stated at p. 88:

> "It is as much his (the prosecutor's) duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

That the instant objection is not without real substance appears from the opinion below, where it is stated:

> "The objection purports to be supported by a number of decisions (of which *United States v. Nettl*, 121 Fed. (2) 927 (C. C. A. 3) will serve as an example), holding that a prosecutor may not impeach an accused (the doctrine would also apply to any witness), by so strongly implying in cross examination that he has been convicted that the jury will not credit his denial, but will accept the implication. Whether *United States v. Nettl* went further, and meant to follow the earlier doctrine of the common law (*Wigmore* § 980, sub. 5)

that only the record of the conviction would serve is not entirely plain. In any event the accused at bar altogether misapply the rule" (op. p. 2258).

For the reasons herein asserted, we respectfully submit that the rule was not misapplied by appellant's counsel as the Court of Appeals suggests. On the contrary, we believe that there was misapprehension by the court below of the problem, as it was presented in its totality, namely, the concededly "improper" questioning, when coupled (a) with the trial judge's approval of that impropriety when it stemmed from the prosecutor, and (b) in contrast, his condemnation of like questions when they emanated from appellant's counsel.

There was, accordingly, substantial prejudicial error which was reversible. Failure of the Court of Appeals to appraise that error, as fatal, suggests the need for invoking, with respect thereto, the supervisory power of the Supreme Court.

POINT XI

There was Fundamental Reversible Error by the Trial Court in Excluding the Defendants and Their Counsel, over Their Objection, from the Hearing of Their Motion to Inspect Certain Papers in the Government's Possession and in Violation of the Constitutional Rights of the Accused, Permitting Argument on that Subject by the Prosecutor in Private, Ex Parte

Grave error, it is submitted, was committed by the trial court in excluding the defendants and their lawyers from the argument of an important motion in the course of the trial. It related to the inspection of certain papers which were in the possession of the government.

This point, which has not been discussed at all in the opinion below, presents fundamental questions of consti-

tutional law. It cannot, in justice, be brushed aside as inconsequential or harmless error. The exclusion of the defendants or their counsel from any phase of a criminal trial, if justified, marks the re-establishment of outworn, condemned, and banished criminal procedure—entirely out of keeping with the American system of criminal jurisprudence. (*Snyder* v. *Mass*, 291 U. S. 97, 138 and cases there cited.)

All that the record shows is that, over vigorous objection, a *private hearing* was granted to the prosecutor by the court *for argument of the defendant's motion.* What transpired at that hearing the record does not disclose. It is patent that here was an important motion in the heart of a criminal trial. Yet it was disposed of *in private*, and without the defendants or their counsel being permitted to participate or even to be present, while the prosecutor was allowed argument *ex parte*. The record shows the objections of defense counsel *before* the hearing. It also shows that, after the private hearing, the court ruled in favor of the government "on grounds of public policy" (R. 3482-6).

The very real question of "*public policy*" however was entirely overlooked, not only by the trial judge and the prosecutor, but the Circuit Court of Appeals. They failed to perceive that *all proceedings* in criminal trials must, in line with constitutional requirements, be in the presence of the defendant or his counsel.

Legal questions in the course of a trial may, of course, be argued in the absence of an accused. No case, however, that we have been able to discover in the course of research is authority for the proposition that *both defendant and his counsel* may, over objection, be excluded by the trial court from the argument of a motion in the midst of trial.

We submit that this is a *jurisdictional* question. It may not be treated superficially. It is of equal moment to the

type of error involved in *Little* v. *U. S.* (10th Cir.) 73 F. (2nd) 861, where it was deemed reversible, *on constitutional grounds,* for the stenographer, albeit at the court's direction, to read the trial charge to the jurors in the juryroom.

The questions of constitutional law involved relate to a defendant's right (a) to a public trial; (b) to have, in his defense, the assistance of counsel; (c) to be present, in a felony trial, *either in person, or by his attorney,* throughout every phase of his trial.

It is submitted that if, in connection with a motion in the course of the trial, the Court does exclude the accused or his lawyer, and then proceeds, in *ex parte* proceedings, to hear the prosecutor in private, there is a clear denial of a basic constitutional right which is *jurisdictionally* fatal, and which unequivocally, therefore, constitutes reversible error.

By this ruling of the trial Court, which goes to the root of the whole subject of due process, and which the Circuit Court of Appeals did not discuss but apparently approved (since the contention was advanced below), there has been sanctioned by both Courts such a departure from the accepted and usual course of judicial procedure as to call for an exercise of the Supreme Court's supervision, to the end that the conviction be set aside because of this patent reversible error.

Point XII

The Conviction of Appellant on Count 1, Based Merely on the Uncertain, Self-Contradictory Opinion of a Witness, as to Mailing in the Southern District of New York, (There Being No Envelope) Was Erroneous Because of Inadequate Evidence as a Matter of Law. The Lack of Proof Was Jurisdictionally Fatal Since Proof beyond a Reasonable Doubt as to the Mailing in the District Was the Sine Qua Non for a Verdict of Guilt

Since the mailing is the "gist" of a mail fraud, and is admittedly the very "*corpus delicti*" of the offense (op. p. 2266), proof of the mailing in the Southern District of New York is the *sine qua non* to support the conviction.

The opinion below, in discussing the subject of mailing, states: (op. p. 2254)

> "As to counts 1, 2, 4, 6, 18, 22, 23 and 27 there was testimony that the letters were mailed from New York or *nearby*."[21] (Emphasis supplied)

The opinion continues: (op. p. 2254)

> "The accused do indeed argue that this testimony was so modified upon cross-examination that, coupled with its somewhat uncertain original character, it must be taken as no testimony at all. We have examined the disputed passages in all such cases, and we are satisfied that this contention is without basis, though it would unduly extend this opinion to discuss each case in detail."

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[21] The Circuit Court of Appeals, in employing the word "*nearby*" obviously erred, since there could not be included in that geographical phrase any point outside of the Southern District of New York. Brooklyn and Jersey City, for example, are two points that are *nearby New York*—and are respectively in the Eastern District of New York and in the District of New Jersey. Yet, mailing at such points, although "*nearby*" would obviously be jurisdictionally fatal under the statute.

We must respectfully record our protest to this conclusion of the court below, for we respectfully submit that it cannot be borne out by the record. The fact is that it is demonstrable, almost to a mathematical certainty, that there is no evidence as to the mailing of the Count 1 letter (no envelope) save for the *mere uncertain, self-contradictory opinion* of a witness—the malicious, malevolent and hostile witness Mussman, to boot.

A full analysis of what was testified to on the subject is fully set forth in the Petition and Brief for Rehearing in the court below (pp. 2-16, annexed to the record certified to this Court). It will be observed therefrom, that not only was there the jurisdictional defect of no proof of mailing (except for such obviously worthless *uncertain opinion*), but there is, contrariwise, an impressive display of *documentary* proof, showing the preparation and mailing of that count letter in Boston, Massachusetts, and therefore beyond the jurisdiction of the Southern District of New York.

In its legal aspect, the presentation of this matter to the jury was complicated by (1) the fact that the trial judge referred in several places in his charge to the *State of New York* (R. 12632-3), creating confusion on the subject, and giving the impression that the mailing was not necessarily to be confined to that segment of New York State which was embraced within the Southern District, and (2) the addressee of the letter resided in Garden City, Long Island, *also in the State of New York*, but in the Eastern District.

Since the mailing was the main ingredient of the offense, we submit that here there was no proof beyond a reasonable doubt, first, because of the inadequacy of the self-contradictory opinion, offered as proof on the subject, and second, in view of the confused, unclarified legal instructions relating thereto.

In *U. S.* v. *Baker*, 50 F. (2) 122, the law on this subject was appropriately stated as follows:

> "To avoid such a perversion of the statute, in the guise of passing upon the weight of evidence, it is necessary to insist upon real proof, circumstantial or direct, that, *beyond a reasonable doubt, the mail was used.*"

The Federal Courts should not reach out to grasp for power, on the assumption that there has been a "mailing" even though the scheme and the frauds have been proven beyond a reasonable doubt (*Mackett* v. *U. S.*, 90 F. (2) 462-3, unless, indeed, the proof of the posting is of sufficient character to meet the stringent requirements of the criminal law—for it is the "mailing" that is the Federal ingredient.

In view of this jurisdictional defect, the appellant Cohen, we respectfully submit, has been illegally convicted.

For the rectification of this error, the supervisory powers of the Supreme Court are invoked, for there has been here sanctioned by the trial court, and with the approbation of the Court of Appeals, what appears to be a departure from the accepted and usual course of judicial proceedings.

Point XIII

The Court of Appeals Erred in Failing to Determine as Reversible, the Following Errors of the Trial Court (Which Were Urged as Substantial in the Court below, but Which Were Not Discussed in the Opinion):

(*a*) *In deliberately receiving hearsay, as proper evidence, and ruling that the truthfulness of conversations contained therein, was for the jury to determine;*

(*b*) *In receiving in evidence, as binding on all other defendants, every statement or act of an alleged conspirator, irrespective of whether it was in furtherance*

of the conspiracy, and without independent competent evidence of the connection of the other defendants with the scheme;

(*c*) *In permitting in evidence the declarations of one conspirator to another, as competent evidence to establish the connection of a third person (the appellant Cohen) with the conspiracy;*

(*d*) *In restricting and destroying the value of cross examination of Government Witnesses as to their prior testimony, by requiring (1) reference to the stenographic transcript, and (2) confronting the witness beforehand with the testimony already given; and*

(*e*) *In admitting evidence as to facts occurring subsequent to the date of the indictment, for three years and three months thereafter, and up to January 1, 1942.*

The foregoing and other points set forth and arising out of the assignment of errors, will not be discussed in this brief for *certiorari*. Though they present basic questions constituting, individually and severally, clear ground for reversal, the propositions urged in the previous points are deemed more weighty. Accordingly, analysis and citation of authority are withheld in an effort to avoid undue extension of this brief.

VII

Conclusion

The substantial questions of both law and policy herein presented, evidencing (a) diversity in the Circuits; (b) a clash of legal opinion on fundamental problems in the administration of the criminal law; (c) apparent conflict with applicable decisions of the Supreme Court; and (d) the need for the exercise by the Supreme Court of its

supervisory power, to rectify basic and jurisdictional errors, as a result of departure by the United States District Court and the Second Circuit from established procedure, individually and in the aggregate, merit the deliberative consideration of the Court of last resort.

It is earnestly believed that this extraordinary mass prosecution may serve as a vicious precedent, if not reversed, and have far-reaching effect, in encouraging noxious inroads upon constitutional liberties, and in finally destroying that most cherished right of a freeman, to be secure in his guarantee of a fair and impartial trial. This case presents a unique occasion for finally clarifying and settling the important and basic problems here discussed, but which now are lodged in uncertainty. Of paramount importance, however, is the need for a restatement of the doctrine of immaterial variance, laid down in *Berger* v. *U. S.*, 295 U. S. 78. It is that doctrine which goes to the heart of the entire subject of mass prosecution.

For the Supreme Court to re-examine the *Berger* doctrine and its proper application, will be, we submit, in the public interest, because of the importance of the subject to Federal criminal justice.

The Application for the Writ of Certiorari Should Be Granted for All of the Reasons Asserted, Both in the Petition and in This Supporting Brief

Respectfully submitted,

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